NO. 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

LOUIS KATCHEN,
Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

FRED M. WINNER
WARREN O. MARTIN
500 Capitol Life Center
Denver, Colorado 80203
Attorneys for Petitioner

Ray F. Frey Co., Denver, Colo.

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I. AN ACTION ARISING FROM A BANKRUPTCY PROCEEDING AND BASED ON A PREFERENTIAL TRANSFER TO RECOVER A MONEY JUDGMENT IS A SUIT AT COMMON LAW COVERED BY THE SEVENTH AMENDMENT.

Respondent states there is no merit in petitioner's claim of denial of a constitutional right to jury trial. This

is so, it is said, because under the English law there was no such right and because this is not a suit at common law covered by the Seventh Amendment.

Respondent could not be more in error. This Court has held specifically to the contrary. It was held that an action arising from a bankruptcy proceeding and based on a preferential transfer brought to recover a money judgment is a suit at common law within the meaning of the Seventh Amendment. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92.

In that case the trustee filed a suit in equity in federal court alleging that payments received by the Schoenthals operated as a preference under Section 60 b. The trustee alleged that it had no adequate remedy at law and sought a decree directing defendants to pay over the sums received. Defendants applied for an order transferring the case to the law side of the court and for a jury trial. The lower courts denied the jury trial. This Court reversed [94]:

> "Section 267 of the Judicial Code provides: 'Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.' 28 U.S.C. §384. That rule has always been followed in courts of equity. The enactment gives it emphasis and indicates legislative purpose that it shall not be relaxed. [om. cit.] *It serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed.* Cf., In re Yerger, 8 Wall 85, 101-103. *In England, long prior to the enactment of our first Judiciary Act, common-law actions of trover and money had and received were resorted to for the recovery of preferential payments by bankrupts. Suits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it.* [Emphasis Supplied] Taylor v. Voss, 271 U.S. 176, 182. They may be brought in the state courts as well as in the bankruptcy courts. Collett v. Adams, 249 U.S. 545, 549. The question whether

> remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. [om. cit.] The facts here alleged give no support to plaintiff's assertion that is has no adequate remedy at law. The preferences sued for were money payments of ascertained and definite amounts. The bill discloses no facts that call for an accounting or other equitable relief. ***"

The holding is directly in point. An action by a trustee to recover a money judgment because of an alleged preferential transfer [which is what is here involved] has been held by this Court to be a suit at common law, as to which there is a constitutional right to a jury trial.

Respondent at times asserts that the claim constitutes a suit in equity, but at other times he asserts that it is a proceeding in bankruptcy. The *Schoenthal* case holds it is *neither;* and the summary hearing below cannot be justified on either basis. This Court has explained the distinction between proceedings in bankruptcy and ordinary actions arising out of bankruptcy. Matters concerning the distribution of the bankrupt's assets are proceedings in bankruptcy. Actions to recover judgments against adverse parties are cases arising out of the bankruptcy, and plenary trials are necessary if the adverse party requests. See *Taylor v. Voss*, 271 U.S. 176. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, should be dispositive of respondent's argument, and, we believe, makes manifest that petitioner was denied his constitutional right to trial by jury.

II. THE DECISIONS OF THIS COURT, NOT THE COURTS OF APPEALS, ARE CONTROLLING.

The major portion of the answer of respondent is devoted to briefs of cases decided by various Courts of Appeal. We agree that decisions from some circuits support, in part, the decision below; although we still say that the

Tenth is the only Circuit extending summary jurisdiction to a non-compulsory counterclaim merely because the counterclaim alleges a preference. (In spite of concessions made on our behalf by respondent, it is clear that the alleged preferential transfer to the North Denver Bank did not arise out of any transaction under which petitioner filed a claim.)

The most interesting thing about respondent's brief is not what it includes, but what it fails to include. There is a total absence of mention of the decisions of this Court relied upon by us in our opening brief. These cases appear to us to compel a holding against summary jurisdiction. We suggest that respondent was unable to state why the decisions of this Court are not controlling. And, certainly, the Circuits cannot overrule this Court.

Alexander v. Hillman, 296 U.S. 22, is argued at length by respondent. Perhaps it is respondent's position that the case overrules the previous decisions of this Court on summary jurisdiction in bankruptcy. For many reasons *Alexander v. Hillman* cannot be so construed. First, it is not a bankruptcy case. Secondly, no mention is made of the bankruptcy law, and the Court gave no indication of overruling its decisions on bankruptcy. Thirdly, the court involved was a court of general jurisdiction whereas the referee in bankruptcy has only that summary jurisdiction specifically conferred by statute. Fourthly, there was no jury issue in *Alexander v. Hillman*, because the counterclaim was cognizable in equity, whereas here, petitioner has a constitutional right to a jury.

Alexander v. Hillman does not justify the result below. The counterclaim there was equitable and the right to a jury thus was not involved. Nor can that decision be extended to permit denial of a jury. In two recent cases this court has held that the right to a jury cannot be denied on an issue, where otherwise it would exist, on the ground that the issue is joined with another on which there is no

jury right. *Beacon Theatres v. Westover*, 359 U.S. 500; *Dairy Queen v. Wood*, 369 U.S. 469.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

FRED M. WINNER
WARREN O. MARTIN

500 Capitol Life Center
Denver, Colorado 80203

Attorneys for Petitioner